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Humanitarian Intervention in Syria?

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Chapter 1: Introduction

On August 21, 2013, during the Syrian civil war, the Assad regime used chemical weapons on its own population.¹ The attack resulted in 1,300 civilian casualties.² A day earlier, US President Obama declared that such an attack would cross a "red line" and would trigger an American military response.³ However, the Obama administration never answered back militarily.⁴ That changed under the Trump administration. On April 6, 2017, in response to another Syrian chemical weapon attack against its civilians two days earlier, the US launched a missile attack – without United Nations Security Council (UNSC) approval – against a Syrian airfield.⁵ Unfortunately, the Assad regime killed more than 80 civilians using a chlorine gas attack in Douma on April 7, 2018. A week later, the US, France, and the UK responded together with new missile strikes against Syria (again without a UNSC mandate).⁶ One of the arguments to legitimate these strikes was the need for humanitarian intervention (HI).⁷ However, the existence of a right in international law to ground such interventions is unsettled among states and international law scholars.⁸

Article 2(4) of the UN Charter prohibits the use of force in another state's territory. Under conventional law, there are only three exceptions to this prohibition: where a state invites another state to use force within their territory, has authorization from the UNSC, or is acting in self-defense against an armed attack.⁹ The need for HI does not fall neatly into one of these conventional exceptions. Nevertheless, there is a general sense that a customary international law (CIL) norm allowing HI in limited circumstances might be slowly emerging,¹⁰ and several prominent commentators have endorsed the concept.¹¹ The question remains as to whether such a norm has already crystallized in CIL because it requires rather conclusive state practice and *opinio*

¹ Scharf, 2019, p. 590

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Schmitt & Ford, 2017, p. 283

⁶ Scharf, 2019, p. 592

⁷ Schmitt & Ford, 2017, p. 293

⁸ Ibid.

⁹ Scharf, 2019, p. 593

¹⁰ See for example: Cassese, 1999, Roberts, 1999, p. 120, and Wedgwood, 1999, p. 834

¹¹ See for example: Bethlehem, 2013, Koh, 2016, (Greenwood, 2000, and Franck, 2005

juris.¹² If HI has crystallized into a CIL norm, it could constitute a fourth exception to the prohibition of force. The existence of law besides that enshrined in the UN Charter was confirmed in the *Nicaragua* case, where the International Court of Justice used CIL to complement UN Charter law.¹³

In the debate following the 1999 NATO bombings in Kosovo, most international lawyers concluded that the bombings were illegal because NATO did not have UNSC authorization.¹⁴ However, some argued that the intervention was legitimate because it was an effective response to an imminent humanitarian catastrophe.¹⁵ During this intervention, state practice seemed to support the development of a new CIL norm on HI.¹⁶ However, evidence regarding the existence of *opinio juris* on this topic is less convincing.¹⁷ Arguably, a new CIL norm regarding HI had not yet crystallized in 1999.

Not much later, the international community began developing the Responsibility to Protect (R2P) doctrine. Initially, the core thesis of this doctrine was that the international community should be able to intervene when a state is unwilling or unable to protect the security of its own citizens.¹⁸ However, this idea was significantly watered down when the international community finally adopted R2P in paragraphs 138 and 139 of the 2005 World Summit Outcome Document. As paragraph 139 states, there is still a need for UNSC approval if one or more states seek to intervene in the territory of another state on humanitarian grounds. States even concluded that R2P should not purport to be a new norm of international law.¹⁹ Consequently, R2P should not be seen as a new international legal norm on unilateral HI, mainly because an exercise of the R2P doctrine requires authorization from the UNSC. The working definition of humanitarian intervention in this thesis is the use of force on humanitarian grounds without UNSC authorization. The goal of this intervention should be to end human suffering and to improve the humanitarian situation in the target state.

Nonetheless, some scholars believe a CIL norm on HI is emerging and might have even crystallized in the wake of the current Syrian crisis, although this is still

¹² Schmitt & Ford, 2017, p. 294

¹³ Bianchi, 2009, p. 661

¹⁴ The Independent International Commission on Kosovo, 2000, p. 4

¹⁵ Falk, 2005, p. 36

¹⁶ Haines, 2009, p. 489

¹⁷ *Ibid.*

¹⁸ International Commission on Intervention and State Sovereignty, 2001, p. XI

¹⁹ Pommier, 2011, p. 1066

uncertain.²⁰ To prove HI is now a CIL norm requires examining each piece of evidence separately and exhaustively.²¹ This also demands examining state practice and *opinio juris* before the missile attacks. Conducting this type of research would require much more work than is feasible, given the scope of this thesis. Therefore, this research has been narrowed to analyze different sets of criteria (SOCs) – developed by scholars – under which HI can be justified. After analyzing the SOCs, this paper then applies that information to the most recent case of possible HI: the 2018 missile strikes on Syria by the US, France, and the UK (the 2018 missile strikes). These SOCs "may serve like a grain of sand in an oyster, providing a set of concrete ideas and standards around which states may coalesce and ultimately create CIL."²² As such, the SOCs can play an essential role in the development of a customary norm on HI. However, it should be noted that many different frameworks exist on this topic.

A selection of SOCs has been carefully selected for discussion in this paper. The scholars that proposed these frameworks believe a claim to HI is justified when their criteria have been met. If states adhere to these requirements when they resort to HI, they could provide the necessary state practice and *opinio juris* to develop this doctrine in CIL. Therefore, this thesis' goal is to learn what insights can be gained from the application of the selected SOCs to the 2018 missile strikes. These insights can tell us more about the current status of HI. If the 2018 missile strikes meet the criteria for HI, it could mean that these missile attacks contribute to the crystallization of a HI norm. If the 2018 missile strikes cannot be justified under these frameworks, it could indicate movement in another direction or crystallization of a HI norm that does not accord with these criteria. States can establish their own criteria that can develop into CIL and do not need to be endorsed or limited by scholarly recommendations. However, states always have their interests to consider when developing such norms. Therefore, these norms might be biased and tailored to the states' own good. This would not be beneficial for the creation of a genuine CIL norm on HI. Hence, this thesis will focus on the criteria of scholars.

To keep the scope of this thesis appropriate, it only focuses on the US role in the 2018 missile strikes. The choice falls on the US because, unlike the UK and France, they

²⁰ See for example: Sterio, 2014, p. 356, Schmitt & Ford, 2017, p. 300 & Scharf, 2019, pp. 613-614

²¹ Berger, 2001, p. 608

²² Deeks, 2016, p. 1045

are a world power. Therefore, their conduct is more likely to influence behavior from other states. The US is also more active in their efforts to battle chemical weapons than the UK and France. Hence, most literature regarding this topic focuses on the US, which helps to enrich this research project.

The insights gained from this research are essential because they may have significant implications regarding how humanitarian emergencies should be handled in the future. If a CIL norm on HI exists, states could, under certain circumstances, take action without the need for UNSC approval. This thesis aims to answer the following research questions to gain this information:

What legal insights can be gained by applying HI criteria developed by scholars to the United States' 2018 missile strikes in Syria?

- a) What are some key sets of HI criteria developed by scholars?
- b) To what extent do the 2018 missile strikes fulfill these sets of criteria, and, therefore, constitute HI as understood by these scholars?
- c) What does the application of the different SOCs tell us about the 2018 missile strikes and humanitarian intervention?

To answer these questions, Chapter 2 introduces several SOCs and critically assesses them. Chapter 3 applies these criteria to the 2018 missile strikes, and Chapter 4 discusses the insights that can be gained from the application of these criteria.

Chapter 2: Selected sets of criteria

This Chapter discusses several different scholars and the SOC they proposed. After justifying the selection of the scholar and their SOC, each requirement is described and critically assessed. The SOC are discussed in chronological order.

2.1. Michael J. Bazylar

The first SOC that this paper discusses is from Michael J. Bazylar. In his work, Bazylar considers the HI doctrine while examining the atrocities in Kampuchea and Ethiopia in the 1970s and 1980s. Bazylar proposes his own SOC for applying the doctrine of HI. He argues that governments can use these criteria for determining whether they should intervene on humanitarian grounds.²³ Bazylar developed his criteria during the Cold War. During this period, the UNSC was often deadlocked;²⁴ a similar deadlock stymied the international response during the current Syrian crisis. Throughout his work, Bazylar discusses examples of humanitarian emergencies that bear many similarities with the current situation in Syria. One can use his SOC as a starting point for determining how HI criteria developed since the introduction of the UN Charter.

Bazylar's criteria show significant similarities with other SOC from the Cold War era. He cites work from scholars such as Lillich,²⁵ Fonteyne,²⁶ and Farooq.²⁷ However, Bazylar distinguishes himself from these authors by offering a simplified SOC. He argues that to minimize abuses of the HI doctrine and to deter rulers from abusing their subjects, a simple, working set of requirements for HI is required.²⁸ Furthermore, Bazylar takes a holistic approach, taking account of non-Western countries. His work overlaps on specific points with Farooq's²⁹ and Thapa's³⁰ work, two scholars from Pakistan and Nepal, respectively. Thus, because Bazylar's SOC represents intellectual thinking during the Cold War, also clarifies this thinking, and takes non-Western countries into account, his SOC compasses more than other SOC.

²³ Bazylar, 1987, p. 549

²⁴ The Conversation, 2014

²⁵ Lillich, 1967

²⁶ Fonteyne, 1974

²⁷ Farooq, 1981

²⁸ Bazylar, 1987, pp. 597-598

²⁹ Farooq, 1981

³⁰ Thapa, 1968

2.1.1. Large-scale atrocities

Bazyler states that before intervention can take place, the authorities of the target state must be killing or threatening to kill many of their own citizens.³¹ Other government acts that lead to huge loss of life – such as depriving citizens of food – may also fall within this category.³² Although the number of people killed or in peril is important to consider, there is no precise threshold.³³ When the number of deaths reaches into the tens of thousands, the prerequisite for HI likely arises; when the number reaches into the millions, the threshold will be met with certainty.³⁴ However, Bazyler argues that there have also been cases where 2,000 civilian hostages were sufficient to warrant intervention.³⁵ One must note that the threshold could be met if a large segment of a particular national, ethnic, or religious group is being destroyed or threatened.³⁶ Bazyler emphasizes that intervention can only be used to prevent mass killing.³⁷ Intervening states do not have to wait for the killing actually to occur before taking action.³⁸ Where there is clear evidence of an imminent threat, states can intervene to prevent loss of life.³⁹ Finally, Bazyler points to the fact that most interventions cost lives.⁴⁰ Therefore, states contemplating intervention must strike a balance between the loss of life caused by intervention and the lives that would be lost if they do not intervene.⁴¹

Although it is understandable Bazyler does not provide an exact threshold for what constitutes a large-scale atrocity, he could provide more guidance. Bazyler gives examples where this threshold was met, but he does not explain why. When discussing the destruction or threatening of a large segment of a national, ethnic, or religious group and cases where there is clear evidence of an imminent threat of mass killings, Bazyler offers more clarity. Bazyler suggests following the definition of "genocide" under the Genocide Convention and examines the global community's scrutiny of the situation before intervening in the Congo.⁴² However, concerning striking a balance

³¹ Bazyler, 1987, p. 598

³² Ibid.

³³ Id. p. 599

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Id. p. 600

³⁸ Ibid.

³⁹ Id. pp. 600-601

⁴⁰ Id. p. 601

⁴¹ Ibid.

⁴² Id. pp. 599-601

between the loss of life caused by intervention and the lives that might be lost by not intervening, he does not offer a clear answer. Bazzyler says foreign states should not intervene if intervention will cost more lives than it will save.⁴³ This begs some questions. How should states estimate the loss of life before intervening? Is a large difference between the lives lost and lives saved necessary, or is intervention justified when one extra life is saved?

2.1.2. Overriding humanitarian motives

Bazzyler posits that it is essential to consider the intervening state's motives.⁴⁴ Intervention is truly humanitarian only when it is done solely to stop atrocities and not for any territorial, political, or economic gains.⁴⁵ However, a genuinely humanitarian motive seems impossible.⁴⁶ States will seldom intervene in the affairs of another state out of pure altruism.⁴⁷ Therefore, Bazzyler states that states which intervene may be motivated by a limited degree of self-interest, as long as the leading motive for the intervention is humanitarian.⁴⁸

Bazzyler rightly argues that instances where states act out of truly humanitarian impulses are rare. Nonetheless, how can one measure whether the intervenor's motives are at least predominantly humanitarian? We have to rely on documents, such as official statements and reports from UNSC meetings. It is easy to claim that there are humanitarian motives in these situations, but it is difficult to determine a state's true intentions. Therefore, it is best to look for a humanitarian outcome to a situation to determine whether the intervention was truly humanitarian. This idea will be discussed further when analyzing Wheeler's SOC.

2.1.3. Preference for joint action

Bazzyler claims that under the current international security system, the United Nations should always intervene first where possible.⁴⁹ However, it is clear that the United Nations is not always willing or able to do so;⁵⁰ otherwise, there would be no need for an HI doctrine of CIL. If action through the United Nations is not possible, states willing

⁴³ Bazzyler, 1987, p. 601

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Id. p. 602

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

to intervene should act collectively, preferably through regional institutions.⁵¹ Unfortunately, these institutions are often unable to intervene adequately to prevent humanitarian disasters.⁵² For these reasons, Bazylar is prepared to permit uni- or multilateral interventions by one or more states outside the scope of international organizations.⁵³ He is clear that intervention by a group of states should be preferable to unilateral intervention.⁵⁴ Before a state takes unilateral action, Bazylar argues it should request assistance and approval from the international community – preferably from the non-aligned world or non-neighboring states – if possible.⁵⁵

According to Bazylar, by taking joint action, states can build a stronger case for intervention. When states act alone, it is more difficult to prove they have humanitarian motives. If they gather support from several other states, it can be an indicator of good intent because other states are willing to provide support. This criterion can, therefore, strengthen the humanitarian motives requirement. Bazylar argues that gaining support from the non-aligned world is the most reliable proof for justifiable HI. States in the non-aligned world have differing interests in most situations, reducing the chance that a state has a different objective. However, this type of support is also the hardest to obtain. It is unlikely that a non-aligned state would support an intervenor and risk losing support from a veto-casting ally.

2.1.4. Limited intervention

This criterion involves applying the principles of necessity and proportionality to the contemplated HI.⁵⁶ According to Bazylar, intervenors should take the minimum amount of action that is required to stop the killing and, if necessary, to remove the responsible authorities.⁵⁷ Where the intervenors employ more troops than necessary to meet the objective or allow troops to remain in the state after reaching the humanitarian goals, this may signify overreach.⁵⁸ Additionally, Bazylar suggests that UN troops should replace the intervenor's troops as soon as possible.⁵⁹ This criterion requires an active

⁵¹ Bazylar, 1987, p. 603

⁵² Ibid.

⁵³ Id. pp. 603-604

⁵⁴ Id. p. 604

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Id. p. 605

role of the international community to examine the duration of intervening troops' stay.⁶⁰

One can find the principle of proportionality enshrined in Additional Protocol I to the Geneva Conventions. The principle establishes that attacks are prohibited when the force used to achieve a particular legitimate goal is disproportionate to the military importance of that goal.⁶¹ States must balance expected military gains against the interests of the affected civilians based on the principle of military necessity.⁶² Because there is no mathematical formula to determine how the balance should be struck, these principles are difficult to implement.⁶³ In cases of HI, applying the principle is even more challenging. The goal of these interventions is to end human suffering, but it begs the question of how much suffering can be caused in order to prevent or stop suffering. Moreover, it is impossible to determine the exact number of victims and other damage that HI will cause before taking action. However, still, the suffering caused by HI has to be weighed against its anticipated benefits. Interveners, therefore, carry a heavy burden in striking the right balance. For these reasons, these principles must be defined more precisely, especially in cases of HI.

2.1.5. Exhaustion of other remedies

According to Bazylar, the exhaustion of other remedies is the most crucial requirement to a legitimate case of HI.⁶⁴ Intervening states should attempt to exhaust peaceful remedies before resorting to the use of force.⁶⁵ These remedies include diplomatic appeal, condemnation before the UN or regional organizations, and economic sanctions.⁶⁶ When intervenors fail to exhaust peaceful means to resolve the conflict, it can be an indicator that their motives for intervention were not primarily humanitarian.⁶⁷ Consequently, although this is a stand-alone criterion, not exhausting other remedies would weaken an argument for an overriding humanitarian motive. Furthermore, given that time is often of the essence in humanitarian crises, there may be no opportunity

⁶⁰ Bazylar, 1987, p. 606

⁶¹ Article 57(2)(a)(iii) Additional Protocol I

⁶² Gasser, 2015

⁶³ Ronzitti, 2010

⁶⁴ Bazylar, 1987, p. 606

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

to first turn to peaceful measures.⁶⁸ In those cases, states may use the minimum necessary force without first employing peaceful conflict resolution methods.⁶⁹

Although Bazylar clarifies what exhausting other remedies involves, he does not address the UN Charter on this matter. International disputes must be settled by peaceful means in a way that does not endanger international peace and security and justice.⁷⁰ Chapter VI UN Charter elaborates further on the pacific settlement of disputes. States must settle their disputes peacefully, but they may choose the means to do so.⁷¹ Article 33 UN Charter provides a non-exhaustive list of resolution methods. One can roughly divide the means of settlement between diplomatic means on the one hand, and arbitrational and judicial means on the other.⁷² Whereas diplomatic means are not legally binding upon the parties until they have accepted them through treaty or otherwise, arbitrational and judicial means are binding.⁷³ If the means are insufficient to resolve the conflict, states must refer the case to the UNSC,⁷⁴ which can eventually lead to the use of coercion under Chapter VII UN Charter.⁷⁵ Nevertheless, the question remains how far states should go to pursue peaceful remedies before resorting to HI. Because states may freely choose from a non-exhaustive list of peaceful conflict resolution methods, exhausting all peaceful remedies would be an endless task. Unfortunately, Bazylar does not provide a clear answer to this problem. He argues that the use of force must be a last resort but does not provide further guidance.⁷⁶

2.2. Nicolas J. Wheeler

Nicolas J. Wheeler proposed the second SOC that this paper examines. In his book, Wheeler examines the extent to which HI has become a legitimate practice.⁷⁷ He examines the legitimacy of intervention in several Cold War and post-Cold War crises with a humanitarian aspect.⁷⁸ Wheeler concludes that although a new norm of UNSC-

⁶⁸ Bazylar, 1987, p. 606

⁶⁹ Id. p. 607

⁷⁰ Article 2(3) of the UN Charter

⁷¹ Pellet, 2013

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Article 37(1) of the UN Charter

⁷⁵ Pellet, 2013

⁷⁶ Bazylar, 1987, p. 606

⁷⁷ Wheeler, 2000, p. 1

⁷⁸ Id. p. 2

approved HI has developed, unilateral HI continues to be treated with great suspicion by the international community.⁷⁹

Wheeler's SOC is particularly interesting; he takes a somewhat different approach from Bazylar. Just like Bazylar, Wheeler makes a distinction between the minimum requirements to justify HI and other preferential or additional criteria, but he applies this distinction differently. Wheeler derives his criteria from just war theory.⁸⁰ The most striking difference between Wheeler and Bazylar is that Wheeler's SOC's do not include an overriding humanitarian motive as a threshold requirement.⁸¹ In that sense, Wheeler challenges the conventional argument that "the primacy of humanitarian motives is the defining characteristic of a HI."⁸²

Wheeler bases his criteria on work by Tesón and Ramsbotham and Woodhouse. Tesón was the first to suggest that a state's motives are not more important than the outcome of the intervention.⁸³ By giving such importance to Tesón's work, Wheeler shows that he also took non-Western countries into account when developing his SOC's.⁸⁴ Furthermore, Wheeler published his book in 2000, just after the NATO intervention in Kosovo. This moment was the starting point of a groundbreaking debate on unilateral HI.⁸⁵ Wheeler captures this debate in his work. This approach yields insights into changes in the use of criteria to analyze unilateral HI during this period. It shows that UNSC deadlock on humanitarian issues persisted after the Cold War. Because Wheeler takes a different approach than other scholars, his work is cited numerous times. When one takes that into account together with the number of used case studies, its position within the Kosovo intervention debate, and the modern application of the just war theory, this work can offer us more insights on HI than others.

2.2.1. Supreme humanitarian emergency

Wheeler's first minimum requirement, a supreme humanitarian emergency, is comparable to the just war theory requirement for a just cause to ground military action.⁸⁶ According to Wheeler, there is no objective definition of a supreme

⁷⁹ Wheeler, 2000, pp. 16-17

⁸⁰ Id. p. 33

⁸¹ Ibid.

⁸² Id. p. 52

⁸³ Id. p. 33

⁸⁴ Fernando Tesón is an originally Argentinian scholar.

⁸⁵ Wheeler, 2000, p. 16

⁸⁶ Id. p. 34

humanitarian emergency.⁸⁷ He argues that "a supreme humanitarian emergency exists when the only hope of saving lives depends on outsiders coming to the rescue."⁸⁸ Wheeler provides that qualifying an emergency in terms of the number of lives at stake is too arbitrary.⁸⁹ Furthermore, he posits that it is important to distinguish between the abuse of human rights on a regular basis and crimes against humanity.⁹⁰ Wheeler provides examples of clearly justified HI such as genocide, state-sponsored mass murder, mass population expulsion by force, and, in some cases, state breakdown.⁹¹ However, he notes that if we simply wait for these situations to occur, interventions will not happen quickly enough to save lives.⁹² Here, Wheeler agrees with Bazylar that intervenors can act preemptively if there is clear evidence that abuse is imminent.⁹³ However, other states are likely to express doubt about the veracity of the evidence or whether it demonstrates an imminent threat.⁹⁴ This raises the question of who should determine what counts as clear evidence.⁹⁵

Wheeler's supreme humanitarian crisis criterion is similar to Bazylar's fifth criterion. Like Bazylar, Wheeler cannot precisely define a particular act or number of victims as clear threshold metrics that constitute a supreme humanitarian emergency. Nonetheless, Wheeler provides us with a bit more clarity than Bazylar. He claims that such a situation exists when there is no hope that the state where the emergency takes place can or is willing to protect its citizens.⁹⁶ Additionally, Wheeler gives at least some guidance and provides examples of crimes against humanity that will always trigger this criterion.⁹⁷ Nevertheless, it is not clear who decides whether the facts show that these crimes are being committed, and definitional problems persist. For example, many still dispute the Armenian genocide to this day. Granting power to neutral institutions (e.g., the ICC) to provide a judgment on these issues means that

⁸⁷ Wheeler, 2000, p. 34

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Id. p. 35

⁹⁵ Ibid.

⁹⁶ Id. p. 34

⁹⁷ Ibid.

prospective intervenors must wait for a decision before taking action. In many cases, this would be too time-consuming.

2.2.2. The use of force as a last resort

Wheeler posits that the use of force should be a last resort, a requirement that also stems from just war theory and is sometimes called the principle of necessity.⁹⁸ This criterion is similar to Bazzyler's requirement that states exhaust all peaceful remedies before using force. Like Bazzyler, Wheeler does not require intervenors to exhaust every possible remedy. Instead, Wheeler recommends that states explore all options that have any chance to prevent the atrocities.⁹⁹ Only when it is certain that all other options with a chance of success have been exhausted may states use force.¹⁰⁰ If there is still doubt, states should attempt to achieve their goals through non-violent methods.¹⁰¹

Although Wheeler's last resort requirement corresponds with Bazzyler's fifth criterion, there is an interesting difference. Where Bazzyler applies the principle of necessity in his limited intervention criterion, Wheeler applies the principle in his use of force as a last resort criterion. According to Wheeler, the principle of necessity holds that only the use of force would be able to stop the human rights violation at hand.¹⁰² It would, therefore, be more plausible to apply this principle under his supreme humanitarian emergency criterion. Bazzyler, on the other hand, defines this principle differently. According to him, necessity means that intervenors should not use more force than needed.¹⁰³ Bazzyler's view seems to most closely resemble the International Committee of the Red Cross' (ICRC) definition. Relying on the ICRC's definition, the principle of military necessity requires that only measures that are strictly necessary to achieve legitimate military goals and are not prohibited by international humanitarian law (IHL) are permissible.¹⁰⁴ Bazzyler's choice to use the principle in the limited intervention criterion is more plausible than Wheeler's choice of applying it to the use of force as a last resort criterion.

⁹⁸ Wheeler, 2000, p. 35

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Bazzyler, 1987, p. 604

¹⁰⁴ ICRC, 2020

2.2.3. Proportionality

For Wheeler, the requirement of proportionality means that the level of force a state uses should not cause harm that exceeds the harm that the force is intended to prevent.¹⁰⁵ If there are strong doubts that this requirement will not be fulfilled, Wheeler argues that force should not be used because it could lead to disaster.¹⁰⁶ Wheeler's proportionality criterion is very similar to Bazzyler's limited intervention criterion and should be applied in the same manner.

2.2.4. Positive humanitarian outcome

Wheeler's final minimum criterion, a high probability of a positive humanitarian outcome, provides that interveners must believe that the use of force will produce a humanitarian outcome.¹⁰⁷ Whether the action has had positive humanitarian consequences can only be truly evaluated in hindsight.¹⁰⁸ The fulfillment of this criterion will be highly dependent on the extent to which the proportionality requirement has been met.¹⁰⁹ Wheeler states that the outcome will be considered humanitarian in cases where the intervention resulted in the rescue of the victims of oppression and subsequent protection of human rights.¹¹⁰ This would mean that the intervenors must establish a political order that enhances the protection of human rights.¹¹¹ One sign of success is where the withdrawal of the intervenors' forces does not mark the start of a new round of atrocities.¹¹²

Bazzyler does not include such a criterion in his framework. On the one hand, this is somewhat odd; a positive humanitarian outcome to a situation should be the goal of HI. On the other hand, it may make sense to exclude this criterion because it is difficult to apply. Whether the outcome of the HI was positive may not be initially clear. To solve this problem, Wheeler argues that the interveners must believe that the intervention will produce a positive humanitarian outcome.¹¹³ Of course, this requirement is still subjective. It is challenging to establish whether the interveners truly believed they would produce a humanitarian outcome by intervening with force. This poses the same

¹⁰⁵ Wheeler, 2000, p. 35

¹⁰⁶ *Ibid.*

¹⁰⁷ *Id.* p. 37

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

problems as Bazyl's overriding humanitarian motives criterion. One possible solution is to trust the intervenor's belief in a positive humanitarian outcome before the intervention occurs, and undertake a definitive analysis afterward. Only then can the outcome be determined with certainty. The question remains when it is possible to give definitive judgment. Even years after passing such a judgment, the situation can change in an unforeseen way.

2.2.5. Humanitarian motives

Wheeler's first preferential criterion, the presence of humanitarian motives, is remarkable. By not adding the primacy of humanitarian motives to his minimum criteria, Wheeler emphasizes the victims of the abuse instead of the intervenor's motivation.¹¹⁴ Although not a threshold requirement, Wheeler argues the intervention can still be disqualified as humanitarian in cases where the motives behind the selection of the means of intervention are inconsistent with a positive humanitarian outcome.¹¹⁵ However, even if the intervention has non-humanitarian motives, it can still be considered humanitarian in cases where the motives and means employed by the intervening state do not undermine a positive humanitarian outcome.¹¹⁶ In other words, the result of the intervention takes precedence over the motives behind it. Nonetheless, Wheeler posits that humanitarian motives should still be given considerable importance in the analysis.¹¹⁷ Wheeler takes a sensible approach by emphasizing the outcome instead of the motives; identifying an intervenor's true motives is challenging, but a humanitarian outcome can be objectively determined. Wheeler thus argues that a positive humanitarian outcome is a valid indicator of humanitarian motives. Notably, in cases where the international community discovers that the motives were not humanitarian after all, Wheeler posits the intervention can still be disqualified as humanitarian after the fact has taken place.

2.2.6. Humanitarian justifications

Wheeler's second additional criterion is that the intervention should be justifiable in humanitarian terms.¹¹⁸ According to Wheeler, the success of an intervention should not be the decisive factor, because then the legitimacy of HI can only be determined

¹¹⁴ Wheeler, 2000, p. 38

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Id. p. 39

¹¹⁸ Ibid.

after the action has taken place.¹¹⁹ Wheeler argues that if decisionmakers have done everything they can to ensure that there is no contradiction between their humanitarian motives and the character or conduct of the intervention, the intervention can be considered humanitarian even if it is unsuccessful or ends in disaster.¹²⁰

2.2.7. Legality

Since the 1999 NATO intervention in Kosovo, there has been an ongoing debate about the legality of unilateral HI. Most international lawyers consider it to be unlawful.¹²¹ The debate on the legality of unilateral HI is based on whether it has developed into a norm of CIL.¹²² For such a norm to develop, states must engage in a widespread and uniform manner in the practice that is claimed to have the status of CIL, and, additionally, states must do so because they believe that this practice is accepted as law.¹²³ These elements are called state practice and *opinio juris*.¹²⁴ Both elements need to be present to crystallize a CIL norm.¹²⁵ Thus, in order to fulfill this requirement, it must be proven that a CIL norm on unilateral HI exists.

This requirement is somewhat strange. If HI were to be legal under a CIL norm, the criteria that must be fulfilled would most likely form part of this norm. Perhaps the state practice and *opinio juris* that underpinned the crystallization of a CIL norm on HI would contain different criteria than the ones proposed by Wheeler. Arguably, that might make Wheeler's SOC obsolete. Nonetheless, if a state can prove that such a norm exists and thereby prove its intervention is legal, it would strengthen its case for HI. Although it is challenging to prove the crystallization of a customary law norm, it is difficult to deny Wheeler's claim that its existence would be beneficial for states that resort to HI.

2.2.8. Selectivity

According to Wheeler, in exceptional cases of a supreme humanitarian emergency, states should accept the risk of casualties to stop the atrocities.¹²⁶ Nonetheless, Wheeler does not provide insight into the threshold for what constitutes unacceptable

¹¹⁹ Wheeler, 2000, p. 40

¹²⁰ *Ibid.*

¹²¹ *Id.* pp. 40-41

¹²² *Id.* p. 44

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Id.* p. 50

losses. However, he states that the number of lives saved by the intervention must outweigh any loss of life caused by it. It is up to the leaders of the intervening state to make this agonizing decision.¹²⁷ This criterion is similar to the proportionality requirement, but it has a slightly different focus; it is about striking a balance regarding the loss of life instead of the use of force. Nevertheless, the use of the term "selectivity" by Wheeler in this context is curious. It is not clear why he uses this term to apply proportionality in a slightly different way.

2.3. Tom J. Farer

Tom J. Farer proposed the third set of requirements that this paper examines. In a roundtable discussion, Farer provides a test consisting of five requirements. According to Farer, HI is legitimate when it fulfills these requirements.¹²⁸ Five scholars respond to Farer, and Farer then offers a final response. One of the scholars involved in this roundtable is Nicolas Wheeler. This provides helpful insights into the similarities and differences between Wheeler and Farer's SOC's. Furthermore, Farer refers to Wheeler's criteria on several occasions but argues that Wheeler's SOC lacks sufficient detail.¹²⁹ Farer's SOC begins with a threshold requirement to trigger armed intervention and adds four precautionary requirements that must be met to qualify the intervention as humanitarian.¹³⁰ This approach differs from Bazylar and Wheeler's.

Farer's work is particularly relevant because it provides insight into scholarly thought in the aftermath of 9/11. Furthermore, this article was published during the same year in which the World Summit Outcome endorsed the R2P. Although not mentioned explicitly, Farer's work incorporates the International Commission for Intervention and State Sovereignty's (ICISS) report on R2P.¹³¹ Also, while Archibugi claims that Farer only addresses public opinion on HI in western states,¹³² Farer does address non-Western countries in his response to the other scholars.¹³³ Because Fares takes a different approach than other scholars, and a discussion with a response is

¹²⁷ Wheeler, 2000, p. 51

¹²⁸ Farer, et al., 2005, p. 214

¹²⁹ Id. p. 215

¹³⁰ Id. pp. 237-238

¹³¹ Id. p. 214

¹³² Id. pp. 221-222

¹³³ Id. p. 244

incorporated in his work, this SOC offers more insights than others that are not subjected to direct critique.

2.3.1. Violations of fundamental human rights

Farer's first criterion refers to grave and massive violations of fundamental human rights.¹³⁴ By fundamental human rights, Farer is referring to the right to life, the right not to be tortured, the right not to be subjected to serious punishment except for threats (usually not including threatening speech) to reasonable public order following a finding of guilt through a fair judicial process, and the right not to be punished for reasons of ethnic, religious or racial enmity.¹³⁵ Farer calls this requirement his "triggering" requirement.¹³⁶ He states it will generally be fulfilled where slaughter, systematic torture, mass detention for an indefinite period under deplorable conditions, and systematic and deep violation of minority rights occur.¹³⁷ Additionally, it can also be fulfilled in cases "where the collapse of a central authority or its incompetence, perhaps coupled with a natural disaster, threatens life on a large scale."¹³⁸

Farer adds a "spike test" to this criterion, which requires a massive spike in human rights violations shortly before the intervention.¹³⁹ According to Farer, such a test should limit the risk of abuse by intervening states because it sets a strict threshold for HI claimants.¹⁴⁰ Moreover, the spike test also addresses the concern that HI could endanger the national independence of many states where day to day conditions are consistently adverse for most citizens.¹⁴¹ The test limits the number of states which could potentially be subject to intervention and defines a limited mandate for the interveners.¹⁴² Farer states that interveners can only return the situation in the target society to how it was before the spike and cannot make additional political alterations after the intervention.¹⁴³ For these reasons, Farer considers the spike test essential to

¹³⁴ Farer, et al., 2005, p. 215

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Id.* p. 216

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* p. 217

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

gather broad support for the doctrine.¹⁴⁴ Nevertheless, Farer is not clear what a huge spike actually entails, either in numbers or duration.

2.3.2. Exhaustion of all remedies short of force

Farer also requires that all remedies short of force have been exhausted before armed HI occurs.¹⁴⁵ He provides three exceptions to this requirement. Not all remedies need to have been exhausted when (i) timely and effective intervention requires early recourse to force; (ii) remedies short of force that might ultimately be effective are very likely to inflict more collateral damage to human welfare than armed intervention would; or (iii) the massive deprivation of fundamental human rights stems from conditions that cannot be altered other than by reconstruction of political authority and the reallocation of power in the target society.¹⁴⁶ This criterion is similar to Bazzyler's exhaustion of all remedies criterion and Wheeler's last resort criterion. In contrast to Bazzyler and Wheeler, Farer does not explicitly mention any principles underpinning this criterion.

2.3.3. Limited intervention

Farer's limited intervention criterion is similar to Bazzyler's limited intervention requirement and Wheeler's requirements of proportionality and selectivity.¹⁴⁷ In Farer's test, he argues that the intervention must be conducted in compliance with IHL.¹⁴⁸ Additionally, collateral damage during the intervention cannot exceed the damage the subject population would have endured if there had been no intervention.¹⁴⁹ The interveners must therefore take all reasonable measures to limit collateral damage.¹⁵⁰ Although Farer does not explicitly mention the principle of proportionality, it plays a significant role in this requirement. This criterion encompasses Bazzyler's limited intervention criterion, as well as Wheeler's proportionality and selectivity criteria. Also, Farer argues that other IHL rules must be taken into account,¹⁵¹ but he does not elaborate on this.

¹⁴⁴ Farer, et al., 2005, p. 218

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Id.* p. 219

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

2.3.4. Positive humanitarian outcome

Farer requires a high probability that the intervention will achieve a positive humanitarian outcome, which he takes directly from Wheeler's set.¹⁵² He argues that the interveners must establish goals beforehand and choose the right means to achieve these goals in order to fulfill this requirement.¹⁵³ The established goals must lead to a clearly improved humanitarian situation.¹⁵⁴ The same problems that pertain to Wheeler's framework also arise with Farer's criterion.

2.3.5. Reporting

This criterion requires the intervening states to report the intervention to the UNSC, to lay out a program for eliminating the threat to human rights and restoring indigenous authority once the triggering conditions are terminated, and to request that the UNSC monitor their compliance with the program and assess the performance of the legitimizing conditions underpinning the intervention.¹⁵⁵ According to Farer, this requirement ensures that interveners do not end the intervention until they have a reasonable chance to improve the conditions that produced the spike in fundamental human rights violations.¹⁵⁶ If the UNSC monitors the interveners, the HI will be legitimate.¹⁵⁷

Bazyler and Wheeler do not propose such a criterion in their SOCs. This requirement is reflective of language used in Article 51 of the UN Charter, which states that "measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the UNSC." Following the same approach to HI ensures that states are aware that they must report the action immediately after the action has taken place. However, Article 51 is unclear as to how states must report interventions to the UNSC. State practice shows that reporting usually happens through a formal written report from the reporting state's permanent UN representative, addressed to the Council president or the UN Secretary-General.¹⁵⁸ However, these reports occasionally take a different form.¹⁵⁹

¹⁵² Farer, et al., 2005, p. 219

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Id.* p. 220

¹⁵⁷ *Ibid.*

¹⁵⁸ Green, 2015, p. 571

¹⁵⁹ *Id.* p. 571

Additionally, Farer argues that the intervenor must lay out a program that the UNSC will monitor.¹⁶⁰ This is problematic. The deadlocked UNSC may be unwilling to undertake a monitoring role. Under Farer's approach, members of the UNSC who are opposed to intervention must then assess whether the intervening state has satisfied its objectives. There is a high chance that countries on the UNSC who objected to the intervention will counter any further measures.

2.4. Harold Hongju Koh

Harold Hongju Koh proposed the fourth and final SOC. In his article, he argues that the international community has reached a moment where, under certain circumstances, unilateral HI may be lawful.¹⁶¹ Koh discusses the case studies of Kosovo, Libya, and Syria (before the 2018 missile attacks) to support this claim. Koh then suggests criteria for an international legal test on HI, claiming that HI could be legal if these conditions are met.¹⁶² This claim is, however, incorrect. Even under this framework, the use of force would violate the UN Charter.¹⁶³ Nevertheless, when states accept and frequently use this framework, it could eventually crystallize into a CIL norm on HI.¹⁶⁴ Hence, Koh aims to create such a norm, and, although he receives continued skepticism, he thinks it is still worth the effort.¹⁶⁵

Koh's criteria are the most recent criteria that this thesis examines, making it useful for analysis of current events. Koh established these criteria during the Syria crisis and he takes the Kosovo and Libya interventions into account. In each of these cases, Koh was personally involved.¹⁶⁶ Given that Koh worked for the US government, one must view his suggestions with some skepticism as his insights on HI may be somewhat one-sided. Nevertheless, Koh is a prominent scholar with firsthand experience in dealing with HIs and readily criticizes the US government's actions. His SOC is too valuable to be ignored, mainly because he is the only prominent scholar that explicitly aims to create a CIL norm on HI.

¹⁶⁰ Farer, et al., 2005, p. 220

¹⁶¹ Koh, 2016, p. 972

¹⁶² Id. p. 1011

¹⁶³ Sterio, 2014, p. 159

¹⁶⁴ Ibid.

¹⁶⁵ Koh, 2016, p. 1012

¹⁶⁶ Id. p. 976

2.4.1. Humanitarian crisis

Koh's first criterion ought to be split in two. First, there must be a humanitarian crisis that creates consequences that are significantly disruptive of international order.¹⁶⁷ This could include the proliferation of chemical weapons, massive refugee outflows, and events that destabilize regional peace and security.¹⁶⁸ Additionally, these consequences must be likely to create an imminent threat to the interveners, giving rise to an urgent need to act in individual and collective self-defense.¹⁶⁹

The first part of this criterion is similar to the other criteria regarding human suffering. However, Koh somewhat distinguishes his criterion by adding that the humanitarian crisis must produce consequences that significantly disrupt international order.¹⁷⁰ Koh is unclear as to what constitutes a disruption of international order, but he provides some examples. The second part of the criterion is more problematic as it almost converts HI into a self-defense paradigm; it requires that the intervenors be linked to the crisis in some way.¹⁷¹ Here, Koh ignores the entire goal of HI, which is to save people in another state from mass atrocities, and not to protect the intervenors themselves. True HI is distinct from self-defense and states with a valid self-defense argument should justify using force with a self-defense argument instead of HI.¹⁷²

2.4.2. UNSC resolution unavailable and exhaustion of other remedies

Koh proposes that HI will be justified where UNSC resolution is unavailable and states have exhausted other remedies.¹⁷³ He argues that this criterion will be fulfilled when a UNSC resolution is impossible because of a persistent veto.¹⁷⁴ Additionally, states that have persistently sought UNSC authorization must have exhausted all other remedies reasonably available under the circumstances.¹⁷⁵ This criterion is similar to the other criteria regarding the exhaustion of other remedies. However, Koh's condition is less strict because it only requires that states exhaust reasonably available remedies. This is sensible as it allows possible intervenors to skip futile steps. Furthermore, Koh explicitly requires that action by the UNSC must be impossible due to a persistent

¹⁶⁷ Koh, 2016, p. 1011

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Sterio, 2014, p. 157

¹⁷² Ibid.

¹⁷³ Koh, 2016, p. 1011

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

veto.¹⁷⁶ This is interesting because there can be other reasons why a UNSC resolution is unavailable. By requiring a persistent veto, Koh ensures potential interveners have made several attempts to take action through the UNSC; it is therefore closely related to the exhaustion of other remedies.

2.4.3. Limited use of force

According to Koh, the use of force must be limited to genuinely humanitarian purposes that are necessary and proportionate to address the imminent humanitarian threat.¹⁷⁷ The use of force must demonstrably improve the humanitarian situation and halt as soon as the threat ends.¹⁷⁸ Therefore, Koh does not expect the interveners to rebuild the target state unless doing so is necessary to eliminate the threat. This criterion can also be divided into two. The first part of the requirement covers genuinely humanitarian purposes and is therefore similar to other criteria regarding humanitarian motives. However, whereas Bazylar and Wheeler do not require the motives to be purely humanitarian, Koh holds (somewhat problematically) that the motives must be genuinely humanitarian.¹⁷⁹ Purely altruistic interventions are extremely rare. Therefore, it is sensible to emphasize a humanitarian outcome instead of the intervening state's motives. That being said, Koh argues the intervenor's motives should not contradict or undermine a humanitarian outcome.¹⁸⁰ The second part of this criterion involves applying the principles of necessity and proportionality and requires a positive humanitarian outcome. On this point, Koh aligns with the other SOC's examined in this thesis.

2.4.4. Collective action

Koh's first preferential criterion deals with collective action. States can strengthen their claim for the legality of their actions by acting collectively.¹⁸¹ As examples, Koh cites the General Assembly's Uniting for Peace Resolution or regional arrangements under Chapter VIII of the UN Charter.¹⁸² This requirement is similar to Bazylar's joint action criterion. In contrast to Bazylar, Koh does not mention seeking support from the non-

¹⁷⁶ Koh, 2016, p. 1011

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

aligned world or non-neighboring states, potentially making Koh's criterion easier to fulfill and presumably offering weaker evidence of humanitarian motives.

2.4.5. Preventing the use of illegal means

Next, Koh adds a preferential criterion which provides that intervention should be aimed at preventing the use of a per se illegal means by the state subject to intervention.¹⁸³ Koh mentions the use of banned chemical weapons as an example because these can create consequences that are significantly disruptive of international order.¹⁸⁴ Although ending illegal activities is not the same as a positive humanitarian outcome, it is nonetheless a positive humanitarian consequence of intervention. Whether humanitarian intervention prevents a state's illegal acts can only be determined in hindsight.

2.4.6. Helping to avoid an illegal end

Koh's last criterion, helping to avoid a per se illegal end, is also preferential.¹⁸⁵ Intervention should help to avoid a per se illegal end, such as war crimes, crimes against humanity, or avertable humanitarian disasters such as the widespread slaughter of innocent civilians.¹⁸⁶ These examples imply that illegality must take place on a large scale. Avoiding illegal means and an illegal end is a positive humanitarian consequence of intervention, and fulfillment of this criterion will not be certain until after the intervention has taken place.

¹⁸³ Koh, 2016, p. 1011

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

Chapter 3: Application of the criteria

Chapter 3 applies the previously discussed criteria to the 2018 missile strikes. First, the Chapter provides a brief background on the most important facts. Afterward, the criteria are applied based on these and other facts. In order to avoid repetition, all similar criteria are discussed simultaneously.

3.1. Background

The crisis in Syria is currently the most severe threat to international peace and security.¹⁸⁷ Many factors complicate this crisis, mainly due to Russian support for the Assad regime. Russia is unlikely to retract this support because – amongst other geopolitical reasons – Syria allows Russia to keep its only naval base outside the territory of the former Soviet Union in Syria.¹⁸⁸ Voicing its support for the Assad regime, Russia blocked the UNSC from taking measures against the mass atrocities committed in Syria.¹⁸⁹ After Obama failed to carry out a military response against Syrian chemical weapon attacks in 2013,¹⁹⁰ the most the American government could accomplish was to accept a Russian-brokered deal under which Syria was to give up its chemical weapons and submit to international inspections.¹⁹¹

The situation changed when Donald Trump took office as US President in 2017. Syria did not live up to the Russian-brokered deal and again attacked civilians with chemical weapons on April 4, 2017, killing 72 people, including children.¹⁹² Two days later, Trump ordered the launch of 59 Tomahawk missiles at the Shayrat Airfield in Syria, the place from which observers believed the Assad regime launched the chemical attack.¹⁹³ The attack was unilateral and the US provided no legal justification for it. Trump only said that the attack was "in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons."¹⁹⁴ Nevertheless, there was broad support for the missile attacks among US allies. Only Russia, Iran, Bolivia, and Syria expressed their opposition.¹⁹⁵

¹⁸⁷ U.N. SCOR, 73rd Sess., 8233d mtg. at 2, U.N. Doc S/PV.8233 (Apr. 14, 2018)

¹⁸⁸ LaGrone, 2017

¹⁸⁹ U.N. SCOR, 73rd Sess., 8233d mtg. at 8, U.N. Doc S/PV.8233 (Apr. 14, 2018)

¹⁹⁰ Baker & Weisman, 2013

¹⁹¹ Gordon, 2013

¹⁹² Ackerman, et al., 2017

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Scharf, 2019, pp. 591-592

Unfortunately, these attacks did not deter the Assad regime from using chlorine gas in an attack on Douma in 2018, killing more than 80 civilians.¹⁹⁶ A week later, on April 14, 2018, the US, France, and the UK together launched another round of missile strikes against Syria.¹⁹⁷ According to Trump, the attack's purpose was "to establish a strong deterrent against the production, spread, and use of chemical weapons." He further declared that he was prepared to continue with similar military action until Assad stopped using chemical weapons.¹⁹⁸ France argued that the intervention was a necessary response to the chemical massacres in Syria, noting the Syrian regime continually violated its legal obligations.¹⁹⁹ It claimed the action was, therefore, in full conformity with the objectives and values established in the UN Charter.²⁰⁰ The UK, on the other hand, explicitly argued that it was permitted under international law to take action on the basis of HI.²⁰¹ The UK justified its action by publishing its own SOC and issued a statement explaining that all requirements of the SOC were met, arguing it was authorized to take "exceptional measures" in response to the chemical attacks.²⁰²

There were 103 missiles fired during the 2018 attack.²⁰³ Joseph Dunford, the US Joint Chiefs of Staff's Chairman, said that "the targets that were struck and destroyed were specifically associated with the Syrian regime's chemical weapons program."²⁰⁴ The targets included a scientific research facility related to the Syrian chemical weapons program,²⁰⁵ a chemical weapons storage facility, a chemical weapons equipment storage site, and a command post.²⁰⁶ The US Joint Chiefs of Staff expressed the hope that the Syrian chemical weapons program would be set back for years as a result of the strikes.²⁰⁷

Russia condemned the attack and called it "an act of aggression" that "was committed without a mandate from the UNSC and in violation of the UN Charter and the norms

¹⁹⁶ Borger & Beaumont, 2018

¹⁹⁷ Ibid.

¹⁹⁸ BBC, 2018

¹⁹⁹ U.N. SCOR, 73rd Sess., 8233d mtg. at 9, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²⁰⁰ Ibid.

²⁰¹ UK Government, 2018

²⁰² Ibid.

²⁰³ BBC, 2018

²⁰⁴ AP, 2018

²⁰⁵ BBC, 2018

²⁰⁶ Scharf, 2019, p. 592

²⁰⁷ Sanchez, 2018

and principles of international law."²⁰⁸ Russia pled for a UNSC resolution condemning the attack but failed to obtain a majority.²⁰⁹ In general, the missile strikes enjoyed broad support among the international community.²¹⁰

3.2. Application of the criteria

3.2.1. Large-scale atrocities

According to Bazylar, only massive killings or threats to kill many people serve as a justification for intervention,²¹¹ but he did not precisely quantify numbers. Around the time of the 2018 missile attacks, it was estimated that at least 470,000 died during the Syrian civil war.²¹² However, the strikes were not a direct response to the overall suffering of the civil war, but only a retort for the use of chemical weapons.²¹³ The chemical attacks death toll, approximately 1,500, is much lower than the overall number of deaths in the civil war. Nevertheless, Bazylar provides the example of the Congo as a case study, where 2,000 civilians from 18 different states were held hostage; this was sufficient to trigger an intervention.²¹⁴ This number is comparable with the number of chemical weapons victims in Syria, but Syria is arguably more serious as people were not just held hostage, but actually killed. Although the hostages had many different nationalities and the victims in Syria are presumably mainly Syrian, one could argue that the chemical weapon attacks by the Assad regime are large-scale atrocities. Additionally, the 2018 missile strikes did not cause any reported deaths.²¹⁵ Therefore, a fair balance was struck between the deaths caused by the intervention and the lives that would have been lost without action. Whether the number of people in danger or who have already been killed by chemical weapons will meet this condition's threshold is open to debate. Nonetheless, chemical weapons present a special case,²¹⁶ and the prohibition of these weapons is even considered a *jus cogens* norm by some.²¹⁷ In light of the seriousness of using chemical weapons into account

²⁰⁸ Dunkelberg, et al., 2018

²⁰⁹ U.N. SCOR, 73rd Sess., 8233d mtg. at 22, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²¹⁰ Scharf, 2019, p. 593

²¹¹ Bazylar, 1987, p. 598

²¹² Boghani, 2016

²¹³ Schmitt & Ford, 2017, p. 302

²¹⁴ Bazylar, 1987, p. 299

²¹⁵ O'Connell, 2018, p. 326

²¹⁶ Scharf, 2019, p. 606

²¹⁷ Id. p. 613

and the small amount of damage caused by the intervention, it appears the 2018 missile strikes fulfill Bazzyler's first criterion.

The same reasoning applies to Wheeler's supreme humanitarian emergency criterion. Wheeler posits that such an emergency exists when the only hope of saving lives is HI.²¹⁸ The Syrian chemical weapons attacks are arguably state-sponsored mass murder, which Wheeler states is a crime against humanity.²¹⁹ It is unlikely that a regime that attacked its own citizens will then shift course and save their lives. Therefore, whether Syrian civilians threatened by chemical weapons live or die depends on outsiders taking actions against prospective attacks. Wheeler's criterion also appears to be fulfilled.

However, an application of Farer's first criterion to the Syrian situation in 2018 is not as cut and dry. Although it is clear that the Syrian government violated fundamental human rights by using chemical weapons on civilians, the facts do not appear to satisfy Farer's spike test. Although there is no clear threshold number that constitutes a spike, it is unlikely that the Syrian use of chemical weapons meets that threshold. As discussed above, the 2018 missile strike intervention was a response to the use of chemical weapons. These weapons only caused the deaths of a small number of the total victims of the Syrian government. Moreover, even when the sole focus of the spike test is the use of chemical weapons, the test is still not satisfied. Approximately 80 people lost their lives due to the chemical weapon attack that provoked the 2018 intervention, compared to 1,300 during a similar attack in 2013. Eighty lives lost is simply not enough to fulfill Farer's spike test.

Furthermore, Koh's first criterion is similar to the above criteria.²²⁰ Koh gives the example of the proliferation of chemical weapons,²²¹ and thus the strikes clearly fulfill this criterion. The second part of this Koh's criterion, that the humanitarian crisis must pose an imminent threat to the intervening states,²²² is however not so clearly met. One could argue that massive refugee outflows might pose such a threat to the interveners. However, it is difficult to determine the extent to which the chemical weapons attacks themselves caused the exodus of refugees and destabilized the

²¹⁸ Wheeler, 2000, p. 34

²¹⁹ Ibid.

²²⁰ Koh, 2016, p. 1011

²²¹ Ibid.

²²² Ibid.

region. The deaths resulting from these attacks only comprise a small portion of the overall number of civil war victims. Therefore, it is challenging to determine whether the chemical weapon attacks caused destabilization. Furthermore, the attacks themselves did not pose an imminent threat to the US and its allies. The consequences of the chemical attacks, taken alone, were not likely to disrupt the international order such as to create an imminent threat to the intervening states. Consequently, it is unlikely that the 2018 missile strikes fulfill this requirement.

3.2.2. Humanitarian motives

For Bazylar, the overriding motive of the intervention must be humanitarian to fulfill the humanitarian motives criterion.²²³ In justifying the 2018 missile strikes, the US told the UNSC that neither it, nor its allies, acted out of revenge, as punishment, or as a symbolic show of force. Instead, the US stated they acted "to deter the future use of chemical weapons by holding the Syrian regime responsible for its crimes against humanity."²²⁴ Additionally, the US Department of Justice Office of Legal Counsel issued an official opinion which stated that US justifications for the intervention were based on "the US interest in mitigating humanitarian disasters" and on "the deterrence of the use and proliferation of chemical weapons."²²⁵ These statements suggest at least an overriding humanitarian motive. Further suggesting altruistic motives is that the states who objected to the 2018 missile strikes did not express doubts regarding the intervening states' motives.²²⁶ For these reasons, it appears the intervening states' claims that they conducted the missile strikes to end the Syrian chemical weapon program are credible. Although it cannot be said with certainty there were no hidden intentions behind the 2018 missile strikes, it is notable that the intervening states took no further measures to occupy Syrian territory. Consequently, the 2018 missile strikes seem to fulfill Bazylar's criterion here.

Wheeler's humanitarian motives criterion is a preferential one.²²⁷ In case the international community discovers that the interveners' motives were not humanitarian after all, the 2018 missile strikes could be disqualified from being HI.²²⁸ The motives of

²²³ Bazylar, 1987, p. 601

²²⁴ U.N. SCOR, 73rd Sess., 8233d mtg. at 5, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²²⁵ April 2018 Airstrikes Against Syrian Chemical Weapons Facilities, 42 Op. O.L.C. 1, p. 11 (May 31, 2018).

²²⁶ Dunkelberg, et al., 2018

²²⁷ Wheeler, 2000, p. 38

²²⁸ Ibid.

the intervention do not undermine the fact that the intervention may have a positive humanitarian outcome. Therefore, Wheeler's humanitarian motives criterion is also fulfilled. Additionally, Wheeler's humanitarian justifications criterion requires that the interveners ensure there is no contradiction between their motives and how they undertake the intervention.²²⁹ Because the 2018 missile strikes targeted facilities directly connected with the Syrian chemical weapon program, the intervenors' actions do not seem to contradict their motives (although Russia contests the latter point).²³⁰

The first part of Koh's limited use of force criterion is similar to Bazzyler's and Wheeler's humanitarian motives criteria. In contrast to those authors, Koh narrows the range of acceptable motives, stating that the purpose of the intervention must be genuinely humanitarian.²³¹ This standard is more difficult to prove than an overriding humanitarian motive. Nevertheless, based on the available information, no other possible purposes have arisen concerning the 2018 missile strikes. As explained earlier, the international community has not questioned the motives that drove the intervention.²³² For these reasons, Koh's limited use of force requirement is provisionally fulfilled until evidence for non-humanitarian motives comes to light.

3.2.3. Limited intervention

Most SOCs discuss the number of troops employed in the limited intervention criterion. However, the US and its allies did not employ troops on Syrian soil, opting to conduct the missile strikes from ships and airplanes, making it difficult to apply this requirement to the strikes.²³³ This attack was unique due to its limited duration. The strikes were conducted simultaneously and stopped immediately, and thus the attack did not exceed its predetermined duration. Nonetheless, it is highly questionable whether the 2018 missile strikes stopped the regime from using chemical weapons in the future. The US alleges that on May 19, 2019, Syria used chemical weapons again in the Idlib area.²³⁴ Although this allegation has not yet been confirmed, it is possible that the Assad regime continued using chemical arms. Consequently, it is too early to say with certainty that the strike stopped Syria's chemical weapon program and significantly

²²⁹ Wheeler, 2000, p. 38

²³⁰ U.N. SCOR, 73rd Sess., 8233d mtg. at 3-5, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²³¹ Koh, 2016, p. 1011

²³² Dunkelberg, et al., 2018

²³³ Borger & Beaumont, 2018

²³⁴ Masterson, 2020

improved the humanitarian situation. On the other hand, the US and its allies did not attempt to remove the Assad regime. Additionally, the intervention did not result in any reported loss of life, and thus it struck a fair balance between the lives that might be lost and the lives saved. There is also no evidence that the interveners violated IHL rules.

Because of the contradictory character of the intervention, it is difficult to determine whether it fulfills the limited intervention criteria. On the one hand, the attack was of a limited duration, did not exceed the parameters of the goal it sought to achieve, and struck a fair balance between lives saved and lives lost. On the other hand, this intervention is dissimilar to the examples that the scholars this paper discusses. The intervening countries conducted missile strikes rather than stationing troops in Syria, and it is unclear whether the strikes shut down the program. Nonetheless, a failure to reach a goal does not mean that an action exceeds the bounds of limited intervention. Therefore, one could argue that all criteria regarding a limited intervention are fulfilled.

3.2.4. Exhaustion of all remedies

All of the scholars discussed in this paper argue that potential intervenors first must attempt to exhaust other remedies before resorting to the use of force. This does not require that all other means should actually be exhausted. As mentioned above, there was a Russian-brokered deal to dismantle the Syrian chemical weapons program, but Syria violated its terms. According to Sterio, if Syria violated the inspection regime, it would mean all non-military options have been exhausted and provide the US with the groundwork for a solid legal case for HI.²³⁵

However, Bazylar also mentioned other potential remedies, such as condemnation before the UN and economic sanctions.²³⁶ The US argued it did everything it could with conventional diplomatic tools before using force.²³⁷ Besides the failure of the Russian-brokered deal, Russia vetoed six UNSC resolutions to address chemical weapons in Syria.²³⁸ Furthermore, the involvement of the main investigative body to determine who used chemical weapons in Syria²³⁹ was also prone to a Russian veto.²⁴⁰ Moreover,

²³⁵ Sterio, 2014, p. 169

²³⁶ Bazylar, 1987, p. 606

²³⁷ U.N. SCOR, 73rd Sess., 8233d mtg. at 5, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²³⁸ Ibid.

²³⁹ the Organization for the Prohibition of Chemical Weapons-United Nation Joint Investigative Mechanism

²⁴⁰ U.N. SCOR, 73rd Sess., 8233d mtg. at 5, U.N. Doc S/PV.8233 (Apr. 14, 2018)

the US imposed hundreds of sanctions on entities and individuals involved in the use of these weapons,²⁴¹ including the Syrian government and its supporters.²⁴² The US attempted each potential remedy Bazylar identified, and all of these failed. The same applies to Wheeler's and Farer's criteria on this matter. It is uncertain whether the use of force was a last resort and none of Farer's exemptions apply here.

It is worth noting that the scholars do not address the UN Charter on this matter. In addition to diplomatic means, Chapter VI of the UN Charter also refers to arbitral and judicial remedies. Although it is highly uncertain that these remedies would have been successful, the US did not use them before conducting the 2018 missile strikes. Arbitral and judicial means are more intensive than the examples Bazylar suggests, but they are worth considering nonetheless. Furthermore, the argument that there was no time to attempt peaceful resolution before the strikes is weak. The chemical attack, which occurred a week before the intervention, was not ongoing and the damage it caused could not be reversed. Additionally, there was no evidence of an imminent threat of a subsequent attack. Therefore, the intervening states could have exhausted other remedies before using force.

While Koh's exhaustion of other remedies criterion is similar to those proposed by the other scholars, his criterion is arguably easier to fulfill. Koh only requires that intervening states exhaust remedies that are reasonably available under the circumstances.²⁴³ There is a fair argument that arbitral and judicial means were not reasonably available to the US because Syria already violated the Russian-brokered agreement, making it possible that the 2018 missile strikes fulfill this criterion.

3.2.5. Positive humanitarian outcome

Wheeler's and Farer's positive humanitarian outcome criteria provide that interveners must believe an intervention will produce positive humanitarian consequences.²⁴⁴ As suggested earlier, the US and its allies believed their action would set back the Syrian chemical weapons program for years and would deter the regime from using these weapons again. However, evidence shows such attacks might occur again. It is too early to determine with certainty whether the intervention achieved its goal, making it

²⁴¹ U.N. SCOR, 73rd Sess., 8233d mtg. at 5&6, U.N. Doc S/PV.8233 (Apr. 14, 2018)

²⁴² U.S. Department of the Treasury, 2017

²⁴³ Koh, 2016, p. 1011

²⁴⁴ Wheeler, 2000, p. 37 & Farer, et al., 2005, p. 219

is unclear if the intervention had a positive humanitarian outcome. It is challenging to argue that the humanitarian situation in Syria clearly improved because of the intervention. The same applies to Koh's preventing the use of illegal means and helping to avoid illegal ends criteria. Although the mass killings during the Syrian crisis continue, the goal of the 2018 missile strikes was to stop the illegal and cruel killing of innocent civilians using chemical weapons. However, it is too early to say whether the strikes achieved that goal.

3.2.6. Joint action

Both Bazzyler and Koh consider joint action to be preferable to unilateral action, so the 2018 missile strikes clearly meet this requirement.²⁴⁵ Before states take individual or collective action, the UN should always be allowed to intervene first.²⁴⁶ The UNSC was working towards a resolution of the Syrian crisis but was deadlocked on the issue of intervention. Bazzyler states that if the UN is unable to act, potential interveners should act collectively if possible, preferably through regional institutions.²⁴⁷ For the US, the most logical option would have been to engage NATO to lead the armed effort. However, the US instead took collective action with two NATO members, France and the UK. Nevertheless, the interveners briefed their NATO allies on the day of the attacks and received NATO's full support for the action.²⁴⁸ Furthermore, the fact that both the UK and France are members of NATO and permanent members of the UNSC supports the US case for intervention, even though they are part of the non-aligned world. Therefore, although the US did not adhere to some of Koh's examples,²⁴⁹ it nonetheless built a robust international coalition with broad support from its allies.²⁵⁰

3.2.7. Legality

It is beyond the scope of this thesis to examine all state practice and *opinio juris* evidence to determine whether a CIL norm on unilateral HI has crystallized. Therefore, this paper includes only a short analysis on this issue. As mentioned earlier, the Kosovo intervention and adoption of the R2P doctrine did not result in the crystallization of a CIL norm on unilateral HI. Although some argue that the current Syria crisis might

²⁴⁵ Bazzyler, 1987, p. 604 & Koh, 2016, p. 1011

²⁴⁶ Bazzyler, 1987, p. 602

²⁴⁷ Ibid.

²⁴⁸ NATO, 2018

²⁴⁹ Invoking the UN General Assembly's Uniting for Peace Resolution or regional arrangements under UN Charter Chapter VIII

²⁵⁰ Dunkelberg, et al., 2018

provide the necessary evidence to support such a norm, there is considerable debate regarding this question. Some observers argue that a new customary law norm is emerging but that it is too early to draw any conclusions.²⁵¹ Whatever the answer to this question is, it is unlikely that such a norm had crystallized before the 2018 missile attack. Thus, the missile attacks likely do not fulfill Wheeler's legality requirement.

3.2.8. Reporting

Farer's reporting criterion provides that interveners must report the intervention to the UNSC and must develop a program to improve the humanitarian situation in the country where they are intervening.²⁵² During the UNSC's 8,233rd meeting on April 14, 2018, the US publicized its motives for the intervention.²⁵³ This occurred after the event in a highly public forum and on the same day that the attack took place. However, the interveners did not propose a follow-up program to improve the situation after the intervention; they simply conducted one round of missile strikes with the hope that it would end the chemical weapons attacks. As a result, the interveners had nothing to report until after the attacks were completed. Because the interveners merely reported the action itself to the UN and did not propose a post-intervention program, the 2018 missile strikes only partially fulfill this requirement.

²⁵¹ See for example: Cassese, 1999, Roberts, 1999, Wedgwood, 1999, Schmitt & Ford, 2017, and Scharf, 2019

²⁵² Farer, et al., 2005, p. 219

²⁵³ U.N. SCOR, 73rd Sess., 8233d mtg. U.N. Doc S/PV.8233 (Apr. 14, 2018)

Chapter 4: Evaluation

This Chapter evaluates the application of the criteria to the 2018 missile strikes. After determining whether the strikes fulfilled the different SOCs, this Chapter discusses the insights one can gain from the application of these criteria to the intervention.

4.1. Fulfillment of the criteria

The 2018 missile strikes do not completely fulfill any of the SOCs. While the strikes could have fulfilled Bazzyler's framework, Bazzyler was not entirely clear about how to determine the point when all other remedies have been exhausted. Although the strikes bear some similarities to the examples Bazzyler provides, he did not establish a clear threshold for the point of exhaustion. Therefore, it is sensible to review the UN Charter provisions which discuss the pacific settlement of disputes. By applying these provisions to supplement Bazzyler's analysis, it is clear that the interveners did not exhaust all peaceful dispute resolution methods before turning to armed intervention. Consequently, the strikes do not meet the parameters of HI under Bazzyler's framework.

The same issues arise concerning Wheeler's last resort criterion. He requires that intervenors be certain that peaceful methods will not resolve the humanitarian crisis.²⁵⁴ Wheeler argues that if intervenors have not attempted a peaceful dispute resolution method, they cannot be certain that it would have failed.²⁵⁵ Where intervenors neglect arbitral and judicial remedies which they could have attempted before armed intervention, they fail to satisfy Wheeler's SOC. Additionally, it is too early to determine whether the 2018 missile strikes had a positive humanitarian outcome, and it is doubtful whether the intervention had the intended impact. Consequently, the intervention does not meet Wheeler's threshold criteria and thus cannot be considered humanitarian. Furthermore, it is also clear that the 2018 missile strikes do not fulfill Wheeler's preferential legality requirement, although this does not strictly disqualify the 2018 missile strikes from being humanitarian.

An application of Farer's SOC provides the least support for the proposition that the 2018 missile strikes were a true HI. Not only do the 2018 missile strikes not fulfill his exhaustion of remedies and positive humanitarian outcome criteria, they also do not

²⁵⁴ Wheeler, 2000, p. 35

²⁵⁵ Ibid.

fulfill Farer's spike test and reporting criteria. In contrast to the other scholars, Farer requires that there has been a spike in human rights violations before intervenors take military action.²⁵⁶ In this case, however, there was no such spike. Moreover, the 2018 missile strikes only partially fulfill Farer's reporting requirement. The intervenors reported the strikes to the UNSC, but they did not propose a plan to follow up afterward (although such a plan does not comport with the character of the attack, a precise missile strike). Farer's SOC requires that intervenors propose and implement a formal post-intervention program to improve the humanitarian situation in the target country.²⁵⁷ For these reasons, the 2018 missile strikes do not fulfill Farer's framework.

Furthermore, the 2018 missile strikes do not meet Koh's conditions for HI. The main issue is that the strikes do not fulfill the requirement that the chemical weapons attacks create an imminent threat to the intervening states. Also, it is unclear whether the strikes met the two preferential criteria that Koh proposes, the prevention of illegal means and avoiding an illegal end. Nevertheless, the strikes might fulfill Koh's exhaustion of remedies criterion. The intervenors could argue that no remedies other than force were reasonably available.

The SOC that comes closest to justifying the strikes as HI is Bazzyler's. If Bazzyler had defined his exhaustion of other remedies criterion more precisely, the 2018 missile strikes might have fulfilled his SOC. He could have done so by limiting the exhaustion of other remedies criterion to his examples or providing a list of remedies similar to those examples. Alternatively, he could have adopted Koh's version of this criterion, which requires intervenors to exhaust only alternate remedies that are reasonably available under the circumstances before using force. This is a sensible approach. In many cases, it may be a waste of time and effort to pursue resolution methods that have almost no chance of success. This change to Bazzyler's SOC would have resulted in the strikes meeting this requirement, and thus his SOC could have justified the intervention. Similarly, the lack of an imminent threat to the intervenors prevented the strikes from fulfilling Koh's SOC. As discussed in Chapter 2, the inclusion of the exhaustion requirement is misplaced.²⁵⁸ Removing this requirement from a SOC might lead to justification of the strikes as HI under Koh's framework as well.

²⁵⁶ Farer, et al., 2005, p. 216

²⁵⁷ *Id.* p. 219

²⁵⁸ Sterio, 2014, p. 166

An additional complicating factor is that the criteria require there must be a positive humanitarian outcome. Although it might be possible the interveners truly believed the intervention would have a positive humanitarian outcome, there is no clear evidence that the humanitarian situation actually improved in Syria after the strikes. This criterion poses problems as it may take years to fully determine the effects of an intervention were, if they can be determined at all. This intervention is demonstrative of that issue. We will not know whether the strikes damaged the Syrian chemical weapons program enough to bring the program to an end for some time. Moreover, the Assad regime might restart the program from scratch. The alleged 2019 chemical weapons attack in the Idlib area has not yet been confirmed, but it sheds doubt on whether the 2018 missile strikes impaired Syria's chemical weapons program.

4.2. The character of the intervention

Another issue with the 2018 missile strikes – albeit not one that clearly disqualifies them as HI – is the character of the intervention. The limited intervention and reporting criteria are somewhat awkward to apply to missile attacks conducted from ships and airplanes to the SOCs. Most SOCs conceptualize armed intervention as involving troops on the ground and require the attack to stop when the intervention's goals have been achieved. However, these elements do not apply to the 2018 missile strikes, which did not involve troops entering onto Syrian soil. Although Trump declared that the US is prepared to continue with such attacks until Syria ceases using chemical weapons,²⁵⁹ it would be disproportionate to conduct missile strikes continuously until it is certain they have impaired Syria's chemical weapons program. It is more likely that Trump would order a new attack if Syria used chemical weapons again. That would, however, constitute an entirely new and separate intervention; the previous one had already come to an end, and any such intervention would be a response to a different attack than the first. From a HI perspective, it would make more sense to intervene based on the whole Syrian crisis. With 470,000 deaths during this conflict,²⁶⁰ the impact of intervening would have been more significant and removing the Assad regime could lead to an end of the civil war.

²⁵⁹ BBC, 2018

²⁶⁰ Boghani, 2016

4.3. Deterrence

A similar problem occurs when considering the US' deterrent argument on Syria's use of chemical weapons. The strikes were an attempt to deter Syria from performing an "internationally wrongful act" again. By using chemical weapons, Syria conducted an intentionally wrongful act by breaching a legal obligation owed to other parties under international law. The use of chemical weapons invokes Syria's state responsibility, which it owes to the international community.²⁶¹ The use of chemical weapons is prohibited by the 1925 Geneva Gas Protocol²⁶² and the Chemical Weapons Convention.²⁶³ Syria is, together with the US, a party to both instruments.²⁶⁴ Furthermore, the prohibition on the use of chemical weapons is generally considered to be CIL.²⁶⁵

Under certain conditions, states are permitted to perform countermeasures in response to internationally wrongful acts.²⁶⁶ Countermeasures are unilateral measures undertaken by a state as a response to the breach of its rights by the wrongful act of another state.²⁶⁷ These measures typically affect the rights of the wrongdoing state, intending to halt the wrongful act or to extract reparations.²⁶⁸ However, Syria did not breach the intervening states' rights in this case. Nonetheless, other states might undertake countermeasures when the obligation that the wrongdoing state breaches is owed to the international community as a whole,²⁶⁹ although this is controversial.²⁷⁰ In other words, if the use of chemical weapons violates an obligation *erga omnes*, other states may be permitted to undertake countermeasures. Although it would be interesting, it goes beyond the scope of this thesis to discuss this matter thoroughly. For the sake of argument, let us accept that the prohibition on the use of chemical weapons is *erga omnes*.

²⁶¹ Article 1 and 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR)

²⁶² Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

²⁶³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

²⁶⁴ Schmitt & Ford, 2017, p. 290

²⁶⁵ Henckaerts & Doswald-Beck, 2005, p. 259

²⁶⁶ Schmitt & Ford, 2017, p. 291

²⁶⁷ Paddeu, 2015

²⁶⁸ Ibid.

²⁶⁹ Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR)

²⁷⁰ Paddeu, 2015

The real problem with using intervention as a countermeasure against an internationally wrongful act arises where it involves the use of force. States which undertake countermeasures must refrain from threatening or using force in accordance with the UN Charter.²⁷¹ It is clear the 2018 missile strikes exceed this threshold and, therefore, cannot be classified as a legal countermeasure. Consequently, the character of the strikes does not fit within either the countermeasures nor the HI doctrines. Perhaps they fit more comfortably within the countermeasures doctrine's old but not forgotten predecessor: reprisals.

4.4. Humanitarian reprisals

Reprisals have a long history in public international law although they have been superseded by the concept of countermeasures in recent years.²⁷² However, besides serving as a historical basis for the countermeasures doctrine, reprisals have another purpose: they are essentially countermeasures in times of war.²⁷³ Concerning the current state of the law, reprisals are defined as "measures in wartime employed by one party to the armed conflict to make the other party, or parties, abide by the humanitarian rules of international armed conflict."²⁷⁴ Although modern reprisals can only be conducted legally during wartime (and the US government emphasized that the 2018 missile strikes were not an act of revenge or punishment²⁷⁵), the character of the attack and the deterrence argument support characterizing the 2018 missile strikes as a reprisal.

The 2018 missile strikes do not fit neatly within the types of intervention that the SOCs discuss. The strikes were a discrete response to the use of chemical weapons, not an intervention where the interveners took control over Syria to improve the humanitarian situation with a sustainable plan. Additionally, the argument of deterrence comports with the modern concept of reprisals; in this situation, the strike might force Syria to abide by the prohibition on the use of chemical weapons. However, a reprisal could not be legally justified in this case. There was no state of war between the interveners and Syria. Nevertheless, it is worth repeating that the goal of this thesis is not to justify the strikes, but simply to derive lessons from them. Although the strikes do not clearly

²⁷¹ Article 50(1)(a) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR)

²⁷² Ruffert, 2015

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ U.N. SCOR, 73rd Sess., 8233d mtg. at 5, U.N. Doc S/PV.8233 (Apr. 14, 2018)

fit within the HI doctrine or the notions of countermeasures and reprisals, perhaps they represent the birth of a new concept: humanitarian reprisals.

A humanitarian reprisal would be a more precise, less drastic version of traditional HI. The conditions for a humanitarian reprisal would be similar to those of HI but would apply to attacks like the 2018 missile strikes. Just like with HI, large-scale atrocities must take place before a state could undertake a legal humanitarian reprisal. Furthermore, a state must possess motives for the reprisal which are at least overridingly humanitarian. However, a humanitarian reprisal would not possess the same requirements for a positive humanitarian outcome. Because these types of attacks are intrinsically limited, and do not endure until the atrocities end, the goal of humanitarian reprisals should be to respond to large-scale atrocities and deter the target state from continuing with these actions. If the atrocities continue after the intervention, a full-scale HI might be appropriate. Nevertheless, it should at least be possible that the reprisal will have a positive humanitarian outcome. The principle of proportionality is key; the use of force should be appropriate and not exceed what is necessary to deter the target state from continuing the violations. The goal of the humanitarian reprisal cannot be to take control of the target state, even if this would demonstrably improve the humanitarian situation. The latter action falls within the realm of HI. Furthermore, the intervening states must exhaust all peaceful remedies which are reasonably available and immediately report the action to the UNSC after it is completed. Finally, as with HI, joint action is preferential to unilateral action.

The 2018 missile strikes would fulfill these requirements. However, just as with HI, that does not necessarily mean that humanitarian reprisals are legal. The action would still operate outside of the common set of rules regarding reprisals. Nonetheless, keeping HI and humanitarian reprisals conceptually distinct allows both concepts to develop independently. The possible emergence of a CIL norm on HI would not be hindered by actions like the 2018 missile attacks, which do not constitute a full-scale HI. Furthermore, a new norm might develop in the form of humanitarian reprisals. These reprisals would be less intrusive than a traditional HI and could provide quick responses to the most severe internationally wrongful acts. The requirements for this type of action are less strict, but, in comparison to HI, the amount of force that a state could use in a humanitarian reprisal is limited. To some extent, this would allow for a decreased threshold. A more fulsome discussion of humanitarian reprisals is outside

of the scope of this thesis. Nonetheless, it is essential to emphasize that the 2018 missile strikes would fit more neatly within a new concept, humanitarian reprisals, than within the boundaries of traditional HI.

Chapter 5: Conclusion

The goal of this thesis was to gain insights by applying several scholars' SOC's on humanitarian intervention to the 2018 missile strikes. Four SOC's were carefully selected and applied to the 2018 missile strikes.

Based on the description and analysis of the different SOC's, one could argue that they are all similar to a certain extent. Each set requires that some sort of large-scale atrocity takes place in the target state. However, none of the scholars can provide a precise threshold regarding when this requirement is triggered. Another criterion that all scholars included in their criteria was the exhaustion of all remedies before using force. However, none of the scholars address the UN Charter on this matter, and they provide little guidance as to when the interveners have exhausted enough remedies to fulfill this criterion. Only Koh offers some clarity here, positing that the intervener need only exhaust remedies which are reasonably available. Another recurring criterion in the SOC's is that the intervener must have humanitarian motives. Because it is difficult to determine what the true motives of an intervener are, it is therefore challenging to measure adherence to this requirement (if it is possible at all). Therefore, Wheeler only uses this requirement as a preferential one and Farer does not even add this criterion to his SOC. This is highly controversial, but Wheeler and Farer include a requirement that there must be a positive humanitarian outcome, which they suggest should be weighted more heavily in determining whether an intervention was humanitarian. One can determine this requirement somewhat objectively, but whether it has been fulfilled may be uncertain until long after the intervention has taken place.

After discussing these criteria, this paper applied the SOC's to the 2018 missile strikes to determine whether they could be characterized as an instance of HI. The 2018 missile strikes do not fulfill any of the SOC's. For now, it is uncertain whether the humanitarian situation in Syria significantly improved as a result of the strikes. Thus the strikes do not fulfill the positive humanitarian outcome criteria.

Moreover, the character of the intervention criteria does not apply neatly to the SOC's. Missile strikes conducted from ships and airplanes do not fit the scholars' definitions of intervention, which generally involves the interveners taking control of the target country until the humanitarian situation improves. Also, the US's argument that the strikes were a deterrent comports awkwardly with the character of the action. When

described using this language, it appears the action was a form of countermeasure. However, according to the law of countermeasures, states are not permitted to use force in these situations. States are permitted to use force under the doctrine of reprisals, but there must exist a state of war between the intervening state and the target state. The US and Syria are not in such a circumstance.

Nevertheless, these types of actions provide the framework for the introduction of a new concept in international law: humanitarian reprisals. Although also illegal, these types of reprisals would essentially be a lighter version of HI. Humanitarian reprisals would address the serious humanitarian wrongdoing of the target state and deter it from continuing with the violations. Although the concept of humanitarian reprisals has not yet been developed, it would cover the 2018 missile strikes more comfortably. As this thesis demonstrated by applying several different SOCs, the 2018 missile strikes do not fit neatly within the doctrine of HI. The action, therefore, has not contributed to the crystallization of a CIL norm on HI under these scholars' frameworks. Instead, these strikes might signal the development of a new concept, such as humanitarian reprisals.

Due to the limited scope of this project, this thesis could not go into deep detail on some subjects. There are many other HI SOCs, but only a small number of leading criteria were included. Furthermore, it was not feasible to examine every piece of evidence regarding the 2018 missile strikes, and this project relied on evidence published by the interveners. Russia and other opponents of the intervention contest some of this evidence. Finally, some interesting research topics came up during this project. These include further examination of state practice and *opinio juris* regarding a CIL norm on HI, examining whether the prohibition on chemical weapons is an obligation *erga omnes*, analyzing the role of the principle of necessity in theories of HI, and further research on humanitarian reprisals.

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